IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-96

DENNIS ALFONSO WEATHERFORD,
Petitioner,

versus

STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Dennis Alfonso Weatherford, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the Court of Criminal Appeals of Alabama rendered on the 20th day of February, 1979, which affirmed Petitioner's conviction for the crime of rape.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama denying writ of certiorari is reported at 369 So. 2d 873. A copy of that judgment appears in Appendix "A".

The opinion of the Alabama Court of Criminal Appeals has been reported at 369 So. 2d 863. A copy of said opinion appears in Appendix "A".

JURISDICTION

The judgment of the Court of Criminal Appeals of Alabama was entered on the 20th day of February, 1979, and is annexed hereto in Appendix "A", infra, Page 1a.

A timely Application for Rehearing to the Court of Criminal Appeals was denied, without opinion, on the 27th day of March, 1979. The Judgment thereon is annexed hereto in Appendix "A", infra, Page 25a.

A Petition for Writ of Certiorari was filed within the time required by the laws of Alabama in the Supreme Court of Alabama, and this was denied on April 20, 1979. The Judgment thereon is annexed in Appendix "A", infra, Page 26a.

This Court has jurisdiction by virtue of Rule 19 of the Rules of the Supreme Court of the United States which provides, in pertinent part that "a review on writ of certiorari . . . will be granted . . . where a State court

has decided a federal question of substance . . . in a way probably not in accordance with applicable decisions of this Court".

QUESTIONS PRESENTED

I.

Whether a defendant in a criminal case is denied his right to a public trial when the District Attorney, without an Order or any sanction from the Court, orders a spectator out of the Courtroom during the course of the trial.

II.

Whether the due process clause of the Fourteenth Amendment dictates that a defendant in a criminal case be allowed to take the deposition of the prosecuting witness when a material part of the defense depends on the testimony of the prosecuting witness.

III.

Whether it is a violation of constitutional due process for the prosecutor in a criminal case to be allowed to adduce testimony into the case relating to extraneous and prejudicial facts, namely, whether or not the defendant had been booked for another offense on the morning of the date that the alleged offense occurred.

CONSTITUTIONAL PROVISIONS AND THE STATUTE INVOLVED

I.

Constitution of the United States, Amendment XIV, Section I:

> Section 1, . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

II.

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . .

III.

U.S.C.S., Rules of Court, Supreme Court, Criminal Rule 19:

> A review on writ of certiorari . . . will be granted . . .:
>
> (a) Where a state court has decided a federal question of substance . . . in a way probably not in accordance with applicable decisions of this Court.

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Lee County, Alabama on the charge of rape and was sentenced to thirty years in the penitentiary.

The chief witness for the State was the prosecutrix who testified that a white male came in her bedroom and said "keep quiet and you won't get hurt"; that this person partially entered her and then left. The following morning she reported it to the police and went to the police station in Auburn where she picked out the Defendant through a two-way mirror.

The prosecutrix stated that she never hit or struck the intruder; that she did not scream for help; that she did not ask him to leave until the alleged act was completed. She further related that the intruder did not have a weapon and that she did not claw at or scratch the intruder.

The chief psychologist at Bryce Mental Hospital testified that Petitioner was suffering from alcoholism and had uncontrollable impulses; that, in his opinion, Petitioner would not commit rape; that if Petitioner did commit rape in August, 1977, he would have been operating under an irresistable impulse on account of mental illness.

Petitioner testified that on the date in question he was highly intoxicated; that he had been to Bryce Men-

tal Hospital on several occasions; that he had never raped anyone.

Prior to trial Petitioner was not allowed to take the deposition of the prosecutrix. During trial the prosecutor ordered a spectator out of the Courtroom without any sanction from the Court. Further, during the trial the prosecution was allowed to introduce evidence that the Defendant had been booked for indecent exposure on the morning following the alleged rape.

REASONS FOR GRANTING THE WRIT

I.

The first question presented is whether a defendant in a criminal case is denied his right to a public trial when the prosecutor, without an Order or any sanction from the Court, orders a spectator out of the Courtroom during the course of a trial. During the trial in question, the prosecutor ordered a spectator, the Mayor of Loachapoka, Alabama, out of the Courtroom as evidenced by the following quotes taken from the Record:

A. "I told him he would have to stay out of the Courtroom unless called as a witness."

B. "We asked that this person again, whom I do not know, but I understand that he is a close friend of the defendant, be removed from the Courtroom."

C. "I just asked him to stay out of the Courtroom, Your Honor."

D. "I would like to put into the Record that the Court told me that if I had any objection to the person to ask him to stay out of the Courtroom during the trial, and I asked him to stay out of the Courtroom during the trial."

The spectator was intimidated to the extent that he was afraid to return to the Courtroom until called for by the Judge, as evidenced by the following remarks which were made by the spectator when he was called back to the Courtroom:

A. "Question. And I'll ask you whether or not you were asked to leave by anyone?

Answer. Yes, sir.

Question. And who was the person who asked you to leave?

Answer. Mr. Myers.

Question. You're referring to the District Attorney, Mr. Ronald L. Myers?

Answer. Yes, sir."

B. "I didn't intend to come back in here until I found out what was wrong."

C. "Question. Let me ask you this: Did that in any way discourage you from coming back into this Courtroom?

Answer. Certainly did, certainly did. I didn't have any idea, any notion, of coming back after being told not to come back.

Question. Were you afraid to come back in until the Judge got the word to you to come back in?

Answer. I was waiting to see the Judge to see why I couldn't come back."

The Court of Criminal Appeals, in upholding the conviction, cited the proposition that "a Judge has the inherent power to preserve order and decorum in the Courtroom and that in the exercise of such power he may eject spectators without infringing an accused's right to a public trial." However, it was not the Judge who ordered the spectator out of the Courtroom, but the prosecutor. In fact, in the Record the following appears: "The Court has not taken any action to eject anyone from the trial."

Petitioner contends that a constitutional error of this magnitude is *per se* injurious to him and that the "harmless error" doctrine is not here applicable. Where an accused has been deprived of his right to a public trial prejudice is to be presumed without the Court looking into the matter of actual prejudice. The concept of a public trial transcends the issue of defendant's guilt or the disposition of a particular case. *People* v. *Byrnes*, 84 Ca. App. 2d 72, 190 P.2d 290, cert. den. 335 U.S. 847; *People* v. *Jelke*, 308 N.Y. 56, 123 N.E. 2d 769; *Neal* v. *State*,

86 Okla. Crim. 283, 192 P.2d 294; *Allen* v. *State*, 137 S.E. 2d 711 (Ga. App. 1964).

II.

The second question presented is whether the due process clause of the Fourteenth Amendment dictates that a defendant in a criminal case be allowed to take the deposition of the prosecuting witness when a material part of the defense depends on the testimony of the prosecuting witness. Petitioner filed a pre-trial motion to take the deposition of the prosecutrix, said motion being made pursuant to Section 12-21-260(a), Code of Alabama 1975, which provides:

> "The defendant may take the deposition of any witness . . . where the defense or a material part thereof, depends exclusively on the testimony of the witness."

The Court of Criminal Appeals took the position that inasmuch as the defense or a material part thereof did not depend exclusively on the testimony of the prosecutrix, the trial court made a correct ruling. However, when the motion was filed, as was stated in the motion, Petitioner had represented to defense counsel that he did not remember any of the events which allegedly transpired on the date in question and therefore, at that stage of the proceedings, the defense did, in fact, depend exclusively upon the testimony of the prosecutrix.

Petitioner contends that it was a denial of due process of the law under the Fourteenth Amendment to deny him adequate pre-trial discovery. Especially is this true in view of the fact that Defendant had a long history of mental illness of which the trial court was aware, including several incarcerations at Bryce Mental Hospital. In a case such as this, where there was no preliminary hearing, as the State chose to initiate the criminal proceedings by indictment, and no other means of discovery available to Defendant under Alabama law, a deposition was the only opportunity for the Defendant, especially a mentally deranged defendant, to discover the case against him.

III.

The third question presented is whether it is a violation of constitutional due process for the prosecutor to be allowed to adduce testimony relating to the fact that the Defendant had been booked for indecent exposure during the early morning hours of the date in question.

Over defense counsel's objection, a detective was allowed to testify that Petitioner was arrested and booked on a charge of indecent exposure on the morning after the alleged rape occurred. The Court of Criminal Appeals held that any error in the admission of this testimony was cured when defense counsel introduced the testimony of a psychologist which was to the effect that Petitioner had been arrested on previous occasions for indecent exposure.

This issue arose in the context of the trial court allowing the detective to answer the question "What charge the defendant was booked on during the early morning hours of August 11." A timely objection was overruled. The opinion of the Court of Criminal Appeals is in conflict with the proposition that "the due cross-examination of the witness upon the matter brought out by the other side was not a waiver or made competent the evidence offered." *Milton Realty Company* v. *Wilson*, 107 So. 92. Which side brought the matter up first is the important question, not whether or not the Petitioner went into this matter only after the prosecution brought it up.

Appellant contends that this clearly is a denial of due process of law and the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Based on the foregoing contentions, Petitioner contends he was not given a fair trial and consequently his right to due process of law under the Fourteenth Amendment to the U.S. Constitution has been violated. Petitioner respectfully urges this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

BENJAMIN E. POOL

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing petition have been served upon opposing counsel of record, Charles Graddick, Attorney General, State Capitol Building, Montgomery, Alabama 36104, by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of July, 1979.

BENJAMIN E. POOL

APPENDIX "A"

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1978-79

DENNIS ALPHONSO WEATHERFORD

versus 5 Div. 428

STATE

Filed: Feb. 20, 1979

Appeal from Lee Circuit Court

BOWEN, JUDGE:

The appellant was convicted for rape and sentenced to thirty years' imprisonment. Ten separate grounds for reversal of the conviction are asserted on appeal.

I

It was not error for the trial judge to excuse the police officer in charge of the investigation from a general order excluding witnesses from the courtroom. It is within the discretion of the trial judge to excuse some witnesses and not others from the operation of "the

rule" of exclusion. That discretion has been upheld in the following cases involving the excusal of law enforcement officers. *Webb v. State*, 100 Ala. 47, 14 So. 865 (1894); *Lewis v. State*, 55 Ala.App. 140, 313 So.2d 566 (1975); *James v. State*, 52 Ala.App. 389, 293 So.2d 305 (1974); *Goodman v. State*, 52 Ala.App. 265, 291 So.2d 358 (1974); *Browning v. State*, 51 Ala.App. 632, 288 So.2d 170 (1974); *Denson v. State*, 50 Ala.App. 409, 279 So.2d 580 (1973); *DeFranze v. State*, 46 Ala.App. 283, 241 So.2d 125 (1970); *Elrod v. State*, 281 Ala. 331, 202 So.2d 539 (1967); *Ledbetter v. State*, 34 Ala.App. 35, 36 So.2d 564, cert. denied, 251 Ala. 129, 36 So.2d 571 (1948); *McKenzie v. State*, 26 Ala.App. 295, 158 So. 773 (1935); *Wright v. State*, 1 Ala.App. 124, 55 So. 931 (1911). See also C. Gamble, *McElroy Alabama Evidence*, §286.01 (3rd ed. 1977).

While the discretion of the trial judge is not an arbitrary one and must not be abused, permitting one law enforcement officer to remain in court during the presentation of the evidence, notwithstanding the rule to exclude witnesses, is a common and usual practice.

At trial defense counsel gave no reason for his objection to the officer's presence in the courtroom. In the absence of any clear showing of the abuse of the discretion of the trial court and actual prejudice to the appellant we find no error.

II

Error is also predicated upon the in-court identification of the appellant by the prosecutrix.

The rape occurred between 10:30 and 12:00 on the night of August 10, 1977. At 8:00 the next morning the prosecutrix went to the Auburn Police Department, reported the offense and gave a description of her assailant. A detective then took her to a small room where she viewed the appellant through a "two way mirror". The appellant was in custody on another charge when the showup took place. The prosecutrix testified that she "insisted on seeing the person who was in jail", that she "immediately recognized" him and that she was never shown any photograph before the identification procedure.

This court has previously considered the "showup", its propriety, and its admissibility in evidence. *Brazell v. State*, Ala.Cr.App., 3 Div. 849 (Ms. June 20, 1978).

> "Through the practice of showing a suspect singly to persons for purposes of identification, and not as part of a lineup, has been widely condemned, *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967), the admission of evidence of a showup without more does not violate due process of law. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Manson v. Brathwaite*, 432 U.S. ____, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Annotation: Admissibility of Evidence of Showup Identification as Affected by Allegedly Suggestive Showup Procedures, 39 A.L.R. 3d 791 (1971).

"Convinced of the dangers of eyewitness identification, the United States Supreme Court has established constitutional and procedural safeguards surrounding the use of such testimony. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Stovall*, supra; *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Manson*, supra; *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970).

"Whether an out-of-court identification procedure has violated due process depends upon the 'totality of the circumstances'. *Stovall*, supra; *Simmons*, supra; *Coleman*, supra; *Biggers*, supra. This totality of the circumstances test is the standard in deciding whether an identification procedure is unnecessarily suggestive and conducive to irreparable mistaken identification. *Caver v. Alabama*, 537 F.2d 1333 (5th Cir. 1973). Under this test the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal act at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, and the level of certainty demonstrated by the witness at the confrontation. *Biggers*, 93 S.Ct. 382; *Robinson v. State*, 45 Ala.App. 236, 228 So.2d 850 (1969). Against

these factors is to be weighed the corrupting effect of the suggestive identification itself.

"In determining the constitutional adequacy of pretrial identification procedures and the admissibility of identification testimony, the central question is whether, under the totality of the circumstances, the identification was reliable. *Manson*, supra. This determination involves the application of a two-pronged test.

"(T)he required inquiry is two-pronged. The first question is whether the initial identification procedure was 'unnecessarily' *(Stovall)* or 'impermissibly' *(Simmons)* suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnecessarily' or 'impermissibly' suggestive was so 'conducive to irreparable mistaken identification' *(Stovall)* or had such a tendency 'to give rise to a very substantial likelihood of irreparable misidentification' *(Simmons)* that allowing the witness to make an in-court identification would be a denial of due process. *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 914-915 (2d Cir. 1970).

"Suggestiveness is inherent in the showup identification procedure. Wall, *Eye-Witness Identification In Criminal Cases*, P. 28. Nevertheless, prompt, on-the-scene confrontation may be consistent with good police work. *Cornelius v.*

State, 49 Ala.App. 417, 272 So.2d 623 (1973); *Payne v. State*, 48 Ala.App. 401, 265 So.2d 185, cert. denied, 283 Ala. 748, 265 So.2d 192, cert. denied, 409 U.S. 1079, 93 S.Ct. 703, 34 L.Ed.2d 669 (1972); *Robinson v. State*, 55 Ala.App. 658, 318 So.2d 354 (1975). One-on-one confrontations conducted shortly after the commission of the crime may be justified for they allow the 'fresh' identification before memory has dimmed or the suspect has changed his clothing, the prompt release of innocent persons, and the continuation of the search for the perpetrator with a minimum of delay. Wall, p. 38. For these considerations to be effective, the on-the-scene identification must be prompt. *Carter v. State*, Ala.Cr.App. 340 So.2d 94, 98 (1976). ('Our consideration of *Robinson*, the supporting authorities cited therein, and other authorities on the subject, convinces us that most, if not all, of the applicable cases have involved periods of time of less than an hour between the crime and the confrontation.')"

* * * *

"It is mere sophistry to argue that the showup was not unnecessarily suggestive. A showup by its inherent nature is suggestive because the witness is given no other choice. However it is permitted where conducted promptly after the commission of a crime or demand-

ed by necessity, emergency or exigent circumstances."

* * * *

"If, despite the violation of due process standards, the prosecution can establish by clear and convincing evidence that the in-court identification testimony, rather than stemming from the unfair pretrial confrontation, has an independent source, the in-court testimony need not be excluded. *Wade*, 87 S.Ct. 1939."

There is no contention that the showup was unnecessarily suggestive or tainted apart from that suggestiveness inherent in any showup procedure.

The testimony of the prosecutrix is clear and convincing that her in-court identification of the appellant was based on an independent source and did not stem from any unfair pretrial confrontation. When she saw her assailant standing near her bed she "recognized him immediately. He had been at my house February before." Though the prosecutrix gave the police a description of her assailant, the record contains no description or picture of the appellant and hence we cannot determine the degree to which the description given by the prosecutrix fit the appellant. However we note that on cross examination of the prosecutrix on this point defense counsel attempted to impeach her description only by showing that the appellant was "in

the vicinity of six foot or six foot-one" with his shoes on while the victim described her assailant as approximately five foot eight inches with his shoes off. This discrepancy goes to the credibility of the victim's identification rather than its admissibility. The prosecutrix never waivered in her identification of the appellant.

There is simply no evidence that the showup tainted the victim's in-court identification. *Tiptroth v. State*, 342 So.2d 959 (Ala.Cr.App.), cert. denied, 342 So.2d 961 (1977); *Thomas v. State*, 50 Ala.App. 227, 278 So.2d 230 (1973). The appellant's argument that the one man showup identification procedure is a per se violation of due process is not supported by legal precedent. The argument that this particular procedure violated the appellant's constitutional rights is not supported by the facts.

III

The appellant asserts that it constituted "gross prosecutorial misconduct" and denied him his constitutional right to a public trial for the District Attorney to order a spectator not to return to the courtroom during the trial.

During the cross examination of the prosecutrix there was an off-the-record discussion between the Court and the attorneys for both sides. Apparently the District Attorney mentioned that a spectator was causing a problem and the trial judge "asked him to speak to

the spectator in this regard". The jury was then sent back to the jury room. Outside of the courtroom and out of the hearing and presence of the jury, the District Attorney told the spectator to "stay out of the courtroom unless called as a witness". The prosecutor stated that his action was prompted because the spectator was sitting close to the jury and "snickering" at the testimony of the prosecutrix. Neither the judge nor defense counsel observed or overheard any of this conduct.

When the District Attorney announced ready to proceed and informed the court of his actions, defense counsel objected and the trial judge immediately ordered a recess in order that the spectator could be found and returned to the courtroom. When the spectator was not found during that recess defense counsel moved for a mistrial and the trial judge ordered another recess to allow additional time to find the spectator.

Later that same afternoon the spectator, Howell Rowell, returned to the courtroom. He was placed under oath and testified that he was leaving the courtroom room at approximately 2:25. When he got to the door the District Attorney told him that he could not return. Mr. Rowell stated that he did not return to the courtroom until 4:30 when the judge sent for him and that because of the prosecutor's remarks he was afraid to return. He testified that he was a friend of the appellant's and that he found the testimony of the prosecutrix "certainly amusing".

During Mr. Rowell's absence a newspaper reporter and other spectators were present in the courtroom. Though asserted in brief, there is no evidence that Mr. Rowell was the only friend of the appellant in the courtroom.

The trial judge overruled the defense motion for a mistrial and instructed Mr. Rowell that he was welcome to remain in the courtroom, that the trial was open to the public, and that he had done nothing to curtail that right.

The right to a public trial is guaranteed by Section 6 of the Alabama Constitution of 1901. The words "public trial" mean "trial as usually and generally conducted, where the courthouse is open to practically anyone who may wish to attend, and do not mean one where the public is so generally excluded as to confine the attendants to those engaged and interested in the trial and the relatives of the parties". *Wade v. State*, 207 Ala. 1, 2, 92 So. 101 (1921).

> " 'The constitutional right to a public trial is not a limitless imperative.' Lacaze v. United States, 5 Cir., 1968, 391 F.2d 516, 521. The fact that some members of the public were barred from the courtroom does not necessarily mean that a denial of a public trial has occurred; the 'decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a "public trial".' Levine v. United States, 362 U.S. 610, 616-617, 80 S.Ct. 1038, 1043, 4 L.Ed.2d 989 (1960). See also 6 Wigmore on Evidence §1835 at 338." *Aaron v. Capps*, 507 F.2d 685, 687 (5th Cir.), cert. denied, 423 U.S. 878, 96 S.Ct. 153, 46 L.Ed.2d 112 (1975).

The requirement of a public trial "is not absolute in the sense that a defendant has the right to have any particular person present under all circumstances during the course of the trial". *United States ex rel. Laws v. Yeager*, 448 F.2d 74, 80 (3rd Cir. 1970).

It is generally recognized that a judge has the inherent power to preserve order and decorum in the courtroom and that in the exercise of such power he may eject spectators without infringing an accused's right to a public trial. 48 A.L.R.2d 1436 at 1448. "If the conduct of a spectator admitted to a criminal trial interferes with the administration of justice he may be removed. Such removal does not constitute a denial of any right of the public or the accused to a public trial." *Williams v. State*, 57 Ala.App. 158, 163, 326 So.2d 686 (1975), cert. denied, 295 Ala. 428, 326 So.2d 692 (1976). An order excluding certain spectators from the courtroom does not deny the accused a public trial where it appears to the trial judge that a witness was being intimidated by certain persons in the courtroom. *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957, 90 S.Ct. 947, 25 L.Ed.2d 141 (1970); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008, 86 S.Ct. 1961, 16 L.Ed.2d 1201 (1966).

A similar factual situation was present in *Commonwealth v. Burton*, 330 A.2d 833 (Pa. 1975). There, as here, the District Attorney ordered a spectator out of the courtroom.

> "(O)n the fifth day of the seven-day trial, when Mrs. Williams (the Commonwealth's main witness) was scheduled to testify, the district attorney requested court personnel to keep appellant's wife out of the courtroom, explaining that appellant's wife had threatened Mrs. Williams. The district attorney also ordered all members of the Black Panthers kept out of the trial while Mrs. Williams testified. Pursuant to this request, other members of appellant's family were also accidentally excluded. When this came to light, on the day following Mrs. Williams' testimony, appellant's counsel moved for a mistrial, which motion was denied. *While it is true, as appellant argues, that the district attorney had no authority to exclude spectators,* after the trial judge was made aware of the situation, he ratified the actions of the district attorney at least insofar as appellant's wife and members of the Black Panthers were concerned. This presumably was based upon the judge's determination that appellant's wife and the Black Panthers might cause the witness, Mrs. Williams, to change her testimony out of fear. See United States ex rel. Laws v. Yeager, 448 F.2d 74 (3rd Cir. 1971), Commonwealth v. Principatti, 260 Pa. 587, 104 A. 53 (1918). With regard to those members of appellant's family who had been excluded by mistake, we note that the situation was immediately corrected when it was brought to the attention of the court. Under the circumstances, we do not believe that appellant was denied the right to a public trial." *Burton*, 330 A.2d at 837 (emphasis added).

While we recognize the general rule that, where the accused has been denied a public trial, prejudice will be presumed without the burden being placed upon the accused to show actual prejudice, 48 A.L.R.2d at 1454, no argument has been advanced that Mr. Rowell's absence injured or prejudiced the appellant. Under the circumstances of this case we do not think that the exclusion of this one spectator denied the appellant his right to a public trial.

IV

On cross examination defense counsel asked the prosecutrix if she had ever seen a psychologist on a professional basis. Receiving an affirmative response he then established that she had never seen a psychologist or a psychiatrist *prior* to August of 1977, the month she was raped.

This inquiry properly allowed the State to show that the prosecutrix had received psychiatric or psy-

chological help *after* August of 1977. *Brothers v. State*, 236 Ala. 448, 452, 183 So. 433 (1938); *Kroell v. State*, 139 Ala. 1, 36 So. 1025 (1904).

A party may go into any matter gone into by the adverse party and explain anything to his detriment. *Gilbert v. City of Montgomery*, 337 So.2d 140 (Ala.Cr.App. 1976); *Craven v. State*, 22 Ala.App. 39, 111 So. 767 (1927). A party who has brought out evidence on a certain subject has no valid complaint as to the action of the trial court in allowing his adversary to introduce evidence on the same subject. *Brock v. State*, 54 Ala.App. 310, 307 So.2d 707 (1975); *Mitchell v. State*, 42 Ala.App. 41, 151 So.2d 752, cert. denied 225 Ala. 696, 151 So.2d 761 (1962).

V

It was not error to allow the prosecutrix to testify to the details of an incident occurring on her front porch on a night in February, 1977, when the appellant exposed himself to her.

In a rape charge, the State may prove, as tending to show a sexual passion in the accused for the alleged victim, acts by the accused prior to the alleged rape indicating a sexual passion for the victim. *Barnes v. State*, 88 Ala. 204, 7 So. 38 (1890); *Pope v. State*, 10 Ala.App. 91, 64 So.526 (1914). The identity exception to the general rule excluding evidence of prior and subsequent crimes when their only probative value is to show in the defendant a tendency or disposition to commit the now-

charged crime "seems to have taken on a more liberal definition when the defendant is charged with a sex crime such as rape. In such cases the courts seem to allow proof of other similar crimes by the accused if they, in any way, go to identify him as the person who committed the now-charged crime." *McElroy* §70.01(22)(b).

"If the accused's commission of another crime is admissible . . . , the State may prove in meticulous detail the manner in which the accused committed the other crime." *McElroy* §69.02(8). See *Bynum v. State*, 348 So.2d 804 (Ala.Cr.App.), cert. quashed, 348 So.2d 828 (Ala. 1976); *McDonald v. State*, 57 Ala.App. 529, 329 So.2d 583, cert. quashed, 295 Ala. 410, 329 So.2d 596 (1975).

Though not involving evidence of a prior criminal act, in *Mincy v. State*, 262 Ala. 193, 78 So.2d 262 (1955), it was held that, in a prosecution for rape, the testimony of the prosecutrix as to the events which involved the defendant and which happened on the day prior to the offense was admissible on the question of identification. This evidence was admissible under the rule that antecedent circumstances tending to shed light on the transaction or elucidate the facts or show preparation to commit the crime are always admissible in evidence.

Additionally on cross examination of the prosecutrix defense counsel brought out the fact that she had not filed a report with the police with regard to the incident in February. At this point in the trial there had been no indication in any of the testimony that there

could or should have been anything reported to police concerning the encounter between the prosecutrix and the appellant in February. This opened the door for the State, on redirect examination, to go into this matter and show the circumstances connected with it. *Thames v. State*, 10 Ala.App. 210, 64 So. 648 (1914). On redirect examination the State may explain or rebut discrediting facts brought out by the defense. *Payne v. Ray*, 206 Ala. 432, 90 So. 605 (1921); *Jones v. State*, 22 Ala.App. 141, 113 So. 478 (1927); *Whatley v. State*, 144 Ala. 68, 39 So. 1014 (1906).

VI

The appellant contends that the consent to search was not knowingly, intelligently, and voluntarily given and that a search warrant was required.

Proper consent may constitute a waiver of Fourth Amendment rights, *Zap v. United States*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946), and makes a search warrant wholly unnecessary. *Toston v. State*, 333 So.2d 161 (Ala.Cr.App. 1976). The voluntariness of consent to search is a question of fact to be determined from the totality of all the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Smith*, 543 F.2d 1141 (5th Cir. 1976).

The failure to inform the accused of his right to refuse is a factor to consider in determining voluntariness but is not to be given controlling significance. *United States v. Smith*, 543 F.2d 1141, 1143 (5th Cir. 1976).

"While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2048. The burden of proving that the consent was, in fact, freely and voluntarily given rests upon the prosecution. *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). "The State must prove that there was no duress or coercion, express or implied. The consent must be unequivocal and specific, and freely and intelligently given. There must be clear and positive testimony." *Hardy v. State*, 53 Ala.App. 75, 78, 297 So.2d 399 (1974).

Here the trial court, on conflicting evidence, found that the consent to search was voluntarily given. We apply the same rules in reviewing a trial judge's determination of the voluntariness of a consent to search as we do in reviewing his determination of the voluntariness of a confession. Thus when conflicting evidence is presented on the issue of the voluntariness of a consent to search and the trial judge finds that the consent was voluntarily given, great weight must be given his judgment. This finding will not be disturbed on appeal unless the appellate court is convinced that the conclusion is palpably contrary to the weight of the evidence. Even where there is credible testimony to the contrary, if the evidence is fairly capable of supporting the inference that the rules of freedom and voluntariness were observed, the ruling of the trial judge need only be supported by substantial evidence and not to a

moral certainty. *Sullivan v. State*, 340 So.2d 878, 880-881 (Ala.Cr.App.), cert. denied, 340 So.2d 881 (Ala. 1976).

Though it is argued that the appellant was intoxicated and had been without sleep for some time there is also credible evidence to the contrary and sufficient to support the finding of voluntariness made by the trial judge.

VII

Over the objection of defense counsel Detective Downing was permitted to testify that the appellant was arrested and booked on a charge of indecent exposure on the morning after the rape. It was on this charge that the appellant was being held when viewed by the prosecutrix.

Any error in the admission of this testimony was cured when defense counsel, in attempting to prove the legal insanity of the appellant at the time of the crime, introduced the testimony of Dr. Edwin Conrad Seger, Chief Psychologist on the Forensic Unit at Bryce Hospital, that the appellant "got arrested several times as being a peeping Tom and 'voyeurism', it's called"; that "he's also been arrested several times for indecent exposure" and that the appellant has a "long history" of "peeping Tom, exhibitionism, and things of that nature". This testimony of the appellant's own witness in response to questions from his own attorney eradicated any possible prejudice that may have resulted from Detective Downing's testimony. *Strickland v. State*, 151 Ala. 31, 44 So. 90 (1907); *Thompson v. State*, 53 Ala.App. 484, 301 So.2d 248 (1974); *McKenzie v. State*, 33 Ala.App. 7, 33 So.2d 484, cert. denied, 250 Ala. 178, 33 So.2d 488 (1948).

VIII

The appellant contends that the State failed to prove a sufficient degree of force to constitute rape and therefore his motion to exclude the State's evidence was due to be granted. In brief he argues that:

> "The evidence was to the effect that there was no fight between the alleged victim and the Defendant; that there was no affirmative evidence of a struggle; that there was no evidence that any blows or punches were exchanged or inflicted; that there was no evidence that the prosecuting witness scratched or attempted to scratch the Defendant; that there was no evidence that the alleged victim screamed out in despair or hollered for help; that there was no evidence that the Defendant offered to kill the alleged victim or do her serious bodily harm. In fact, the alleged victim testified that the only thing that the Defendant said to her which could be construed as a threat was, 'keep quiet and you won't get hurt'."

The prosecutrix was startled from her sleep in her own bedroom by a male who was standing near her bed. From what she could see of the individual, he was

"stripped to the waist". The prosecutrix testified that she "was so dumbfounded and it happened so quickly — he was on top of me immediately". She was told to "keep quiet and you won't get hurt". The appellant "moved", "pulled", "dragged" and "wrestled" her around on the bed because she resisted by "locking" her legs and thighs. She tried to push herself away and thought about screaming but did not think that she would be heard. The prosecutrix testified that the appellant had her "pinned down" and it was impossible to hit him. She stated that she was in a state of shock and was bruised on her arms and legs though a physician found no evidence of any bruises the next day. The prosecutrix told the physician that there was "no struggle" and his report states that "no nail bed specimen is taken as the patient states she did not scratch or resist in this way".

To constitute rape, the degree of force used need not be such as to place the victim under such reasonable apprehension of death or bodily harm as to overpower her will, it being sufficient that she was under such duress that the act was accomplished against her consent. *Brummitt v. State*, 344 So.2d 1261 (Ala.Cr.App. 1977); *Cole v. State*, 19 Ala.App. 360, 97 So. 891, cert. denied, 210 Ala. 179, 97 So. 895 (1923). "The force necessary to be used, to constitute the crime of rape, need not be actual, but may be constructive or implied. An acquiescence to the act, obtained through duress or fear of personal violence, is constructive force, and the consummation of unlawful intercourse by the man

thus obtained would be rape." *Shepherd v. State*, 135 Ala. 9, 12, 33 So. 266 (1903).

> "An acquiescence obtained by duress, or fear of personal violence, will avail nothing, the law regarding such submission as no consent at all. If the mind of the woman is overpowered by a display of physical force, through threats, expressed or implied, or otherwise, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man would be rape. 1 Whart. Cr. Law, §557; 2 Bishop Cr. Law, (7th Ed.), §1125; 3 Greenl. Ev., (14th Ed.), §211."
> *McQuirk*, 84 Ala. 435, 347, 4 So. 775 (1887).

The offense of rape is complete when unlawful intercourse is accomplished by overcoming resistance, and procuring submission by means of threats, though there may be no intention in fact to apply actual force. *Taylor v. State*, 249 Ala. 130, 30 So.2d 256 (1947); *Norris v. State*, 87 Ala. 85, 87, 6 So. 371 (1888).

> "While the law arms a woman who is assaulted by a man with the intent to ravish her with the right to stand her ground, and, if necessary, to kill her assailant to protect her person from the gratification of his lust, the law does not compel her so to do. All of the circumstances surrounding the commission of the alleged crime are to be considered, and

whether the prosecutrix does or does not repel force by force, or resist her assailant to the uttermost, if the act of penetration is actually accomplished by what, in law, amounts to legal force, and against the will of the prosecutrix, the defendant is guilty of rape. The relative size of the parties, the age of each, their social and racial differences, and the absence of efforts on the part of the prosecutrix to avoid the act are all matters to be weighed by the jury on the question as to whether all the necessary elements of the crime exist, but when all the elements of the crime do exist the crime is one of rape, although the prosecutrix may have made no effort to resist." *Herndon v. State*, 2 Ala.App. 118, 125-126, 56 So. 85 (1911).

Under the facts outlined the State presented prima facie evidence of the elements of rape and the trial judge properly submitted the case to the jury.

IX

The appellant's objection to the closing argument was sustained. There was no motion to exclude and no request for the court to specifically instruct the jury not to consider the improper argument in their deliberations. *Boles v. State*, 19 Ala.App. 184, 186, 95 So. 909 (1923). There was no motion for new trial. Since no adverse ruling was obtained in the trial court there is nothing for this court to review. *Moore v. State*, 48 Ala.App. 719, 722, 267 So.2d 509 (1972).

X

The trial judge denied the appellant's pretrial motion to take the deposition of the prosecutrix. This motion was made pursuant to that portion of Section 12-21-260(a), Code of Alabama 1975, which provides:

> "The defendant may take the deposition of any witness . . . where the defense, or a material part thereof, depends exclusively on the testimony of the witness."

In the motion it was asserted that "the Defendant has advised this attorney that he has no remembrance of the events which allegedly transpired on the date in question; therefore, at this stage, the defense depends *exclusively* on the testimony of the said" prosecutrix. In denying the request the trial judge noted:

> "The defendant's trial has been continued pending a psychological examination of the said defendant and there is no showing that the . . . (prosecutrix), is unavailable for examination by the defendant, and further, the showing is insufficient that the defense rests exclusively on the testimony of the said Nancy Bush. Rather, it appears that . . . (the prosecutrix) is the primary witness for the prosecution, rather than the defendant. It further appears that the said . . . (prosecutrix) is not absent from the State of Alabama."

We uphold the ruling of the trial judge denying the motion. Here the defense or a material part thereof did not depend exclusively on the testimony of the prosecutrix. At trial the defense was not consent. The appellant testified that he had never seen the prosecutrix before and that, although highly intoxicated on the date the crime was committed, he never raped anyone as far as he remembers. The request was properly denied.

We have searched the record and finding no error prejudicial to the appellant we affirm the judgment of the trial court.

AFFIRMED.

All Judges Concur.

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

Circuit Ct. #CC 77 434

5th Div. 428, LEE Circuit Court

DENNIS ALFONSO WEATHERFORD,
Appellant,

versus

THE STATE,
Appellee.

Dear Sir: This is to advise you that on Mar. 27, 1979, the Court of Criminal Appeals announced decision of: application for rehearing overruled in the above stated cause. No opinion.

Yours truly,

MOLLIE JORDAN, CLERK

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 20, 1979

Re: 78-435
EX PARTE: DENNIS ALFONSO WEATHERFORD

Petition for Writ of Certiorari to the
Court of Criminal Appeals

Re: DENNIS ALFONSO WEATHERFORD,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * *

_X_ Petition for Writ of Certiorari denied.
No opinion.

* * *

IN THE

OCTOBER TERM, 1979

NO. 79-96

DENNIS ALFONSO WEATHERFORD,
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDICES

CHARLES A. GRADDICK
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State of Alabama

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NO.

DENNIS ALFONSO WEATHERFORD,
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

OPINIONS BELOW

The Honorable Circuit Court of Lee County, Alabama, entered the Judgment of Conviction against Petitioner; the Honorable Court of Criminal Appeals of Alabama affirmed the conviction on February 20, 1979 and denied rehearing on March 27, 1979. Said opinion and judgments are reported as *Weatherford v. State*, (Ala. Cr. App., 1979) 369 So. 2d 863. A copy of this opinion is attached hereto, marked as Appendix "A".

The Supreme Court of Alabama denied rehearing on April 20, 1979. This order is reported as *Ex parte Weatherford*, (S. Ct. Ala., 1979) 369 So. 2d 873. A copy of this order is attached hereto, marked as Appendix "B".

JURISDICTION

The Petitioner has applied to this Honorable Court for

a writ of certiorari to review the judgment of the Court of Criminal Appeals of Alabama which was rendered February 20, 1979. A petition for a writ of certiorari to the Supreme Court of Alabama was denied without an opinion on April 20, 1979.

The Petitioner seeks the writ under the provisions of Rule 19 of the Rules of the Supreme Court of the United States.

The Petition appears to be timely.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent denies that this case involves any provision of the United States Constitution. However, the Petitioner is making his claim under Amendment XIV, Section I and Amendment VI of the Constitution of the United States.

QUESTIONS PRESENTED

I

Whether a defendant is denied his right to a public trial by the temporary exclusion of a single spectator.

II

Whether the denial of a defendant's motion to take deposition of prosecuting witness violates the due process clause of the Fourteenth Amendment.

III

Whether the admission of evidence concerning the commission of an offense other than the one for which Defendant was being tried violates the due process clause of the Fourteenth Amendment when the defendant's own witness testifies to the same effect.

CONSTITUTIONAL PROVISIONS AND THE STATUTE INVOLVED

The Petitioner is making his claim under Amendment XIV, Section I and Amendment VI of the Constitution of the United States. Petitioner further seeks review under U.S.C.S., Rules of Court, Supreme Court, Criminal Rule 19.

However, the Respondent denies that this case involves any provision of the United States Constitution or any federal question of substance.

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Lee County, Alabama on a charge of rape and was sentenced to thirty years in the penitentiary.

The chief witness for the State was the prosecutrix who testified that a white male entered her bedroom and told her to keep quiet and she would not be harmed. The man then penetrated the victim's vagina and left. The following morning the offense was reported to the police and the victim picked out the defendant after viewing him through a two-way mirror.

The prosecutrix stated that she was "moved", "pulled", "dragged", and "wrestled" by the defendant when she attempted to resist his attack. She further testified that the defendant had her pinned down in such a position that she could not hit or strike him.

The court denied the defendant's motion to depose the prosecutrix. During the trial the prosecutor ordered a spectator who continued to laugh during the victim's testimony to leave the courtroom. During the trial the prosecution was allowed to introduce evidence that the defendant had been charged with indecent exposure on the morning following the alleged rape. However, the defense attempted to prove that the defendant was legally insane at the time of the offense and called Dr. Edwin C. Seger, Chief Psychologist on the Forensic Unit at

Bryce Hospital as an expert witness. In response to questioning by defense counsel, Dr. Seger stated that the defendant had been arrested several times for indecent exposure and had a long history of sex-related offenses.

ARGUMENT

I

The Petitioner claims that he was denied his constitutional right to a public trial when a spectator was temporarily excluded from the courtroom.

However, the Respondent State submits that Petitioner has failed to show that the exclusion of the spectator involves a federal question of substance which would give rise to review by this Court.

As noted in the opinion issued by the Court of Criminal Appeals of Alabama, the prosecutor asked that the spectator, Mr. Howell Rowell, be excluded because he was sitting near the jury and was laughing at the testimony of the prosecutrix. Moreover, when defense counsel objected to the absence of Mr. Rowell the trial court ordered two recesses in order that Mr. Rowell might be relocated. Moreover, after Mr. Rowell was found, the trial court instructed him that he was free to remain in the courtroom for the duration of the trial.

The constitutional right to a public trial is not a limitless imperative. *Lacaze v. United States*, 391 F. 2d 516 (5th Cir. 1968). The fact that some members of the public were barred from the courtroom does not necessarily mean that the denial of a public trial has occurred; the 'decision must turn on the particular circumstances of the case and not upon a question - begging because abstract and absolute right to a "public trial."' *Levine v. United States*, 362 U.S. 610, 616-617, 80 S. Ct. 1038, 1043, 4 L. Ed. 2d 989 (1960).

From the foregoing the Respondent State submits that Petitioner has utterly failed to show that he suffered any

constitutional deprivation due to the temporary exclusion of Mr. Rowell.

II

The Petitioner next contends that he was denied due process of law as guaranteed by the Fourteenth Amendment when the trial court denied his motion to take the deposition of the prosecutrix. The motion was made pursuant to *Code of Alabama 1975*, Section 12-21-260(a) which provides:

> "The defendant may take the deposition of any witness. . . where the defense, or a material part thereof, depends exclusively on the testimony of the witness."

The Respondent State submits that Petitioner has failed to demonstrate constitutional error in this regard. As noted by the Court of Criminal Appeals of Alabama, there was no showing that the prosecutrix was unavailable for examination by the defendant and prior to the time of trial it appeared that the prosecutrix was the key witness of the prosecution, rather than the defense. Hence, under the wording of the statute, the motion was properly denied.

In light of the foregoing the State submits that Petitioner has failed to expose a denial of due process by the action of the trial court.

III

Finally, Petitioner contends that the admission of evidence concerning the commission of an offense other that the one for which he was being tried violated his constitutional right to due process.

However, the Respondent State submits that the Court of Criminal Appeals of Alabama was correct in its finding that any possible prejudice caused by testimony to the effect that Petitioner had been arrested for indecent exposure on the

morning following the alleged rape was cured by the testimony of Petitioner's own expert witness. Dr. Edwin C. Seger, Chief Psychologist of the Forensic Unit at Bryce Hospital, was called to prove that Petitioner was legally insane at the time the offense was committed. Upon questioning by defense counsel Dr. Seger stated that the Petitioner had been arrested several times on charges of voyeurism and indecent exposure; in sum, the witness testified that Petitioner had a long history of sex-related offenses.

Moreover, the case cited by Petitioner, *Milton Realty Co. v. Wilson*, 107 So. 92 (1926) is immediately distinguishable from the instant case. *Milton*, supra, involved a suit for specific performance on a real property contract and dealt with cross-examination of a presumably adverse witness.

Based upon the foregoing argument the Respondent State submits that Petitioner has failed to show a denial of due process of law.

CONCLUSION

In conclusion, the Respondent respectfully submits that the Petition alleges no question cognizable under Rule 19 and prays that the writ be denied.

Respectfully submitted,

CHARLES A. GRADDICK
Attorney General
State of Alabama

C. LAWSON LITTLE
Assistant Attorney General
State of Alabama

JEAN WILLIAMS BROWN
Assistant Attorney General
State of Alabama

CERTIFICATE OF SERVICE

I, C. Lawson Little, Assistant Attorney General of Alabama, one of the attorneys for the Respondent and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this day of August, 1979, I did serve the requisite number of copies of the foregoing Brief and Argument of Respondent on the attorney for the Petitioner, Honorable Benjamin E. Pool, Post Office Box 2247, Montgomery, Alabama 36103, by mailing said copies to him at the aforesaid address with first class postage prepaid.

C. LAWSON LITTLE
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Montgomery, Alabama 36130

APPENDIX "A"

Dennis Alphonso WEATHERFORD

v.

STATE

5 Div. 428.

Court of Criminal Appeals of Alabama.

Feb. 20, 1979.

BOWEN, Judge.

The appellant was convicted for rape and sentenced to thirty years' imprisonment. Ten separate grounds for reversal of the conviction are asserted on appeal.

I

It was not error for the trial judge to excuse the police officer in charge of the investigation from a general order excluding witnesses from the courtroom. It is within the discretion of the trial judge to excuse some witnesses and not others from the operation of "the rule" of exclusion. That discretion has been upheld in the following cases involving the excusal of law enforcement officers. *Webb v. State*, 100 Ala. 47, 14 So. 865 (1894); *Lewis v. State*, 55 Ala.App. 140, 313 So.2d 566 (1975); *James v. State*, 52 Ala.App. 389, 298 So.2d 305 (1974); *Goodman v. State*, Ala.App. 265, 291 So.2d 358 (1974); *Browning v. State*, 51 Ala.App. 632, 288 So.2d 170 (1974); *Denson v. State*, 50 Ala.App. 409, 279 So.2d 580 (1973); *DeFranze v. State*, 46 Ala.App. 283, 241 So.2d 125 (1970); *Elrod v. State*, 281 Ala. 331, 202 So.2d 539 (1967); *Ledbetter v. State*, 34 Ala.App. 35, 36 So.2d 564, cert. denied, 251 Ala. 129, 36 So.2d 571 (1948); *McKenzie v. State*, 26 Ala.App. 295, 158 So. 773 (1935); *Wright v. State*, 1 Ala. App. 124, 55 So. 931 (1911); See also C. Gamble, *McElroy's Alabama Evidence*, § 286.01 (3rd ed. 1977).

While the discretion of the trial judge is not an arbitrary one and must not be abused, permitting one law enforcement officer to remain in court during the presentation of the evidence, notwithstanding the rule to exclude witnesses, is a common and usual practice.

At trial defense counsel gave no reason for his objection to the officer's presence in the courtroom. In the absence of any clear showing of the abuse of the discretion of the trial court and actual prejudice to the appellant we find no error.

II

Error is also predicated upon the in-court identification of the appellant by the prosecutrix.

The rape occurred between 10:30 and 12:00 on the night of August 10, 1977. At 8:00 the next morning the prosecutrix went to the Auburn Police Department, reported the offense and gave a description of her assailant. A detective then took her to a small room where she viewed the appellant through a "two way mirror". The appellant was in custody on another charge when the showup took place. The prosecutrix testified that she "insisted on seeing the person who was in jail", that she "immediately recognized" him and that she was never shown any photograph before the identification procedure.

This court has previously considered the "showup", its propriety, and its admissibility in evidence. *Brazell v. State*, Ala.Cr.App., 3 Div. 849, 369 So.2d 25 (Ms. June 20, 1978).

> "Though the practice of showing a suspect singly to persons for purposes of identification, and not as part of a lineup, has been widely condemned, *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967), the admission of evidence of a showup without more does not violate due process of law. *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); Annotation: Admissibility of Evidence of Showup Identification as Affected by Allegedly Suggestive Showup Procedures, 39 A.L.R.3d 791 (1971).

"Convinced of the dangers of eyewitness identification, the United States Supreme Court has established constitutional and procedural safeguards surrounding the use of such testimony. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *Stovall*, supra; *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Manson*, supra; *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970).

"Whether an out-of-court identification procedure has violated due process depends upon the 'totality of the circumstances'. *Stovall*, supra; *Simmons v. U. S.*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Coleman*, supra; *Biggers*, supra. This totality of the circumstances test is the standard in deciding whether an identification procedure is unnecessarily suggestive and conducive to irreparable mistaken identification. *Caver v. Alabama*, 537 F.2d 1333 (5th Cir. 1973). Under this test the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal act at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, and the level of certainty demonstrated by the witness at the confrontation. *Biggers*, 93 S.Ct. 382; *Robinson v. State*, 45 Ala.App. 236, 228 So.2d 850 (1969). Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

"In determining the constitutional adequacy of pretrial identification procedures and the admissibility of identification testimony, the central question is whether, under the totality of the circumstances, the identification was reliable. *Manson*, supra. This determination involves the application of a two-pronged test.

"(T)he required inquiry is two-pronged. The first question is whether the initial identification procedure was 'unnecessarily' *(Stovall)* or 'impermissibly' *(Simmons)* suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnecessarily' or 'impermissibly' suggestive was so 'conducive to irreparable mistaken identification' *(Stovall)* or had such a tendency 'to give rise to a very substantial likelihood of irreparable misidentification' *(Simmons)* that allowing the witness to make an in-court identification would be a denial of due process. *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 914–915 (2d Cir. 1970). "Suggestiveness is inherent in the showup identification procedure. *Wall, Eye-Witness Identification In Criminal Cases*, p.28. Nevertheless, prompt, on-the-scene confrontation may be consistent with good police work. *Cornelius v. State*, 49 Ala.App. 417, 272 So.2d 623 (1973); *Payne v. State*, 48 Ala.App. 401, 265 So.2d 185, cert denied, 288 Ala. 748, 265 So.2d 192, cert. denied, 409 U.S. 1079, 93 S.Ct. 703, 34 L.Ed.2d 669 (1972); *Robinson v. State*, 55 Ala.App. 658, 318 So.2d 354 (1975). One-on-one confrontations conducted shortly after the commission of the crime may be justified for they allow the 'fresh' identification before memory has dimmed or the suspect has changed his clothing, the prompt release of innocent persons, and the continuation of the search for the perpetrator with a minimum of delay. Wall, p. 38. For these considerations to be effective, the on-the-scene identification must be prompt. *Carter v. State*, Ala.Cr.App., 340 So.2d 94, 98 (1976). ('Our consideration of *Robinson*, the supporting authorities cited therein, and other authorities on the subject, convinces us that most, if not all, of the applicable cases have involved periods of time of less than an hour between the crime and the confrontation.')"

* *

"It is mere sophistry to argue that the showup was not unnecessarily suggestive. A showup by its inherent nature is suggestive because the witness is given no other choice. However it is permitted where conducted promptly after the commission of a crime or demanded by necessity,

emergency or exigent circumstances."

* *

"If, despite the violation of due process standards, the prosecution can establish by clear and convincing evidence that the in-court identification testimony, rather than stemming from the unfair pretrial confrontation, has an independent source, the in-court testimony need not be excluded. *Wade*, 87 S.Ct. 1939."

There is no contention that the showup was unnecessarily suggestive or tainted apart from that suggestiveness inherent in any showup procedure.

The testimony of the prosecutrix is clear and convincing that her in-court identification of the appellant was based on an independent source and did not stem from any unfair pretrial confrontation. When she saw her assailant standing near her bed she "recognized him immediately. He had been at my house February before." Though the prosecutrix gave the police a description of her assailant, the record contains no description or picture of the appellant and hence we cannot determine the degree to which the description given by the prosecutrix fit the appellant. However we note that on cross examination of the prosecutrix on this point defense counsel attempted to impeach her description only by showing that the appellant was "in the vicinity of six foot or six foot-one" with his shoes on while the victim described her assailant as approximately five foot eight inches with his shoes off. This discrepancy goes to the credibility of the victim's identification rather than its admissibility. The prosecutrix never waivered in her identification of the appellant.

[3] There is simply no evidence that the showup tainted the victim's in-court identification. *Liptroth v. State*, 342 So.2d 959 (Ala.Cr.App.), cert. denied, 342 So.2d 961 (1977); *Thomas v. State*, 50 Ala.App. 227, 278 So.2d 230 (1973). The appellant's argument that the one man showup identification procedure is a per se violation of due process is not supported by legal precedent. The argument that this particular procedure violated the appellant's constitutional rights is not supported by the facts.

III

The appellant asserts that it constituted "gross prosecutorial misconduct" and denied him his constitutional right to a public trial for the District Attorney to order a spectator not to return to the courtroom during the trial.

During the cross examination of the prosecutrix there was an off-the-record discussion between the Court and the attorneys for both sides. Apparently the District Attorney mentioned that a spectator was causing a problem and the trial judge "asked him to speak to the spectator in this regard". The jury was then sent back to the jury room. Outside of the courtroom and out of the hearing and presence of the jury, the District Attorney told the spectator to "stay out of the courtroom unless called as a witness". The prosecutor stated that his action was prompted because the spectator was sitting close to the jury and "snickering" at the testimony of the prosecutrix. Neither the judge nor defense counsel observed or overheard any of this conduct.

When the District Attorney announced ready to proceed and informed the court of his actions, defense counsel objected and the trial judge immediately ordered a recess in order that the spectator could be found and returned to the courtroom. When the spectator was not found during that recess defense counsel moved for a mistrial and the trial judge ordered another recess to allow additional time to find the spectator.

Later that same afternoon the spectator, Howell Rowell, returned to the courtroom. He was placed under oath and testified that he was leaving the courtroom at approximately 2:25. When he got to the door the District Attorney told him that he could not return. Mr. Rowell stated that he did not return to the courtroom until 4:30 when the judge sent for him and that because of the prosecutor's remarks he was afraid to return. He testified that he was a friend of the appellant's and that he found the testimony of the prosecutrix "certainly amusing".

During Mr. Rowell's absence a newspaper reporter and other spectators were present in the courtroom. Though asserted in brief there is no evidence that Mr. Rowell was the only friend of the appellant in the courtroom.

The trial judge overruled the defense motion for a mistrial and instructed Mr. Rowell that he was welcome to remain in the courtroom, that the trial was open to the public, and that he had done nothing to curtail that right.

The right to a public trial is guaranteed by Section 6 of the Alabama Constitution of 1901. The words "public trial" mean "trials as usually and generally conducted, where the courthouse is open to practically anyone who may wish to attend, and do not mean one where the public is so generally excluded as to confine the attendants to those engaged and interested in the trial and the relatives of the parties". *Wade v. State*, 207 Ala. 1, 2, 92 So. 101, 102 (1921).

> " 'The constitutional right to a public trial is not a limitless imperative.' *Lacaze v. United States*, 5 Cir., 1968, 391 F.2d 516, 521. The fact that some members of the public were barred from the courtroom does not necessarily mean that a denial of a public trial has occurred; the 'decision must turn on the particular circumstances of the case, and not upon a question-begging because abstract and absolute right to a "public trial".' *Levine v. United States*, 362 U.S. 610, 616—617, 80 S.Ct. 1038, 1043, 4 L.Ed.2d 989 (1960). See also 6 Wigmore on Evidence § 1835 at 338." *Aaron v. Capps*, 507 F.2d 685, 687 (5th Cir.), cert. denied, 423 U.S. 878, 96 S.Ct. 153, 46 L.Ed.2d 112 (1975).

The requirement of a public trial "is not absolute in the sense that a defendant has the right to have any particular person present under all circumstances during the course of the trial". *United States ex rel. Laws v. Yeager*, 448 F.2d 74, 80 (3rd Cir. 1970).

[4] It is generally recognized that a judge has the inherent power to preserve order and decorum in the courtroom and that in the exercise of such power he may eject spectators without infringing an accused's right to a public trial. 48 A.L.R.2d 1436 at 1448. "If the conduct of a spectator admitted to a criminal trial interferes with the administration of justice, he may be removed. Such removal does not constitute a denial of any right of the public or the accused to a public trial." *Williams v. State*, 57 Ala.App. 158, 163, 326 So.2d 686, 691 (1975), cert. denied, 295 Ala. 428, 326 So.2d 692 (1976). An order excluding certain spectators from the courtroom does not deny the accused a public trial where it appears to the trial judge that a witness was being intimidated by certain persons in the courtroom. *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957, 90 S.Ct. 947, 25 L.Ed.2d 141 (1970); *United States ex rel. Orlando v. Fay*, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008, 86 S.Ct. 1961, 16 L.Ed.2d 1021 (1966).

A similar factual situation was present in *Commonwealth v. Burton*, 459 Pa. 550, 330 A.2d 833 (1975). There, as here, the District Attorney ordered a spectator out of the courtroom.

> "(O)n the fifth day of the seven-day trial, when Mrs. Williams (the Commonwealth's main witness) was scheduled to testify, the district attorney requested court personnel to keep appellant's wife out of the courtroom, explaining that appellant's wife had threatened Mrs. Williams. The district attorney also ordered all members of the Black Panthers kept out of the trial while Mrs. Williams testified. Pursuant to this request, other members of appellant's family were also accidentally excluded. When this came to light, on the day following Mrs. Williams' testimony, appellant's counsel moved for a mistrial, which motion was denied. *While it is true, as appellant argues, that the district attorney has no authority to exclude spectators*, after the trial judge was made aware of the situation, he ratified the actions of the district attorney

at least insofar as appellant's wife and members of the Black Panthers were concerned. This presumably was based upon the judge's determination that appellant's wife and the Black Panthers might cause the witness, Mrs. Williams, to change her testimony out of fear. See *United States ex rel. Laws v. Yeager*, 448 F.2d 74 (3rd Cir. 1971), *Commonwealth v. Principatti*, 260 Pa. 587, 104 A. 53 (1918). With regard to those members of appellant's family who had been excluded by mistake, we note that the situation was immediately corrected when it was brought to the attention of the court. Under the circumstances, we do not believe that appellant was denied the right to a public trial." *Burton*, 330 A.2d at 837 (emphasis added).

[5, 6] While we recognize the general rule that, where the accused has been denied a public trial, prejudice will be presumed without the burden being placed upon the accused to show actual prejudice, 48 A.L.R.2d at 1454, no argument has been advanced that Mr. Rowell's absence injured or prejudiced the appellant. Under the circumstances of this case we do not think that the exclusion of this one spectator denied the appellant his right to a public trial.

IV

On cross examination defense counsel asked the prosecutrix if she had ever seen a psychologist on a professional basis. Receiving an affirmative response he then established that she had never seen a psychologist prior to August of 1977, the month she was raped.

[7] This inquiry properly allowed the State to show that the prosecutrix had received psychiatric or psychological help after August of 1977. *Brothers v. State*, 236 Ala. 448, 452, 183 So. 433 (1938); *Kroell v. State*, 139 Ala. 1, 36 So. 1025 (1904).

[8, 9] A party may go into any matter gone into by the adverse party and explain anything to his detriment. *Gilbert v.*

City of Montgomery, 337 So.2d 140 (Ala.Cr.App. 1976); *Craven v. State*, 22 Ala.App. 39, 111 So. 767 (1927). A party who has brought out evidence on a certain subject has no valid complaint as to the action of the trial court in allowing his adversary to introduce evidence on the same subject. *Brock v. State*, 54 Ala.App. 310, 107 So.2d 707 (1975); *Mitchell v. State*, 42 Ala.App. 41, 151 So.2d 752, cert. denied 275 Ala. 696, 151 So.2d 761 (1962).

V

[10] It was not error to allow the prosecutrix to testify to the details of an incident occurring on her front porch on a night in February, 1977, when the appellant exposed himself to her.

[11] In a rape charge, the State may prove, as tending to show a sexual passion in the accused for the alleged victim, acts by the accused prior to the alleged rape indicating a sexual passion for the victim. *Barnes v. State*, 88 Ala. 204, 7 So. 38 (1890); *Pope v. State*, 10 Ala.App. 91, 64 So. 526 (1914). The identity exception to the general rule excluding evidence of prior and subsequent crimes when their only probative value is to show in the defendant a tendency or disposition to commit the now-charged crime "seems to have taken on a more liberal definition when the defendant is charged with a sex crime such as rape. In such cases the courts seem to allow proof of other similar crimes by the accused if they, in any way, go to identify him as the person who committed the now-charged crime." *McElroy* § 70.01(22)(b).

[12] "If the accused's commission of another crime is admissible . . ., the State may prove in meticulous detail the manner in which the accused committed the other crime." *McElroy* § 69.02(8). See *Bynum v State*, 348 So.2d 804 (Ala.Cr.App.), cert, quashed, 348 So.2d 828 (Ala.1976); *McDonald v. State*, 57 Ala.App. 529, 329 So.2d 583, cert. quashed, 295 Ala. 410, 329 So.2d 596 (1975).

Though not involving evidence of a prior criminal act, in *Mincy v. State*, 262 Ala. 193, 78 So.2d 262 (1955), it was held that, in a prosecution for rape, the testimony of the prosecutrix as to the events which involved the defendant and which happened on the day prior to the offense was admissible on the question of identification. This evidence was admissible under the rule that antecedent circumstances tending to shed light on the transaction or elucidate the facts or show preparation to commit the crime are always admissible in evidence.

[13] Additionally on cross examination of the prosecutrix defense counsel brought out the fact that she had not filed a report with the police with regard to the incident in February. At this point in the trial there had been no indication in any of the testimony that there could or should have been anything reported to police concerning the encounter between the prosecutrix and the appellant in February. This opened the door for the State, on redirect examination, to go into this matter and show the circumstances connected with it. *Thames v. State*, 10 Ala.App. 210, 64 So. 648 (1914). On redirect examination the State may explain or rebut discrediting facts brought out by the defense. *Payne v. Roy*, 206 Ala. 432, 90 So. 605 (1921); *Jones v. State*, 22 Ala.App. 141, 113 So. 478 (1927); *Whatley v. State*, 144 Ala. 68, 39 So. 1014 (1906).

VI

The appellant contends that the consent to search was not knowingly, intelligently, and voluntarily given and that a search warrant was required.

[14, 15] Proper consent may constitute a waiver of Fourth Amendment rights, *Zap v. United States*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946), and makes a search warrant wholly unnecessary. *Toston v. State*, 333 So.2d 161 (Ala.Cr.App.1976). The voluntariness of consent to search is a question of fact to be determined from the totality of all the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Smith*,

543 F.2d 1141 (5th Cir. 1976).

[16] The failure to inform the accused of his right to refuse is a factor to consider in determining voluntariness but is not to be given controlling significance. *United States v. Smith*, 543 F.2d 1141, 1143 (5th Cir. 1976). "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent." *Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2048. The burden of proving that the consent was, in fact, freely and voluntarily given rests upon the prosecution. *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968). "The State must prove that there was no duress or coercion, express or implied. The consent must be unequivocal and specific, and freely and intelligently given. There must be clear and positive testimony." *Hardy v. State*, 53 Ala.App. 75, 78, 297 So.2d 399, 402 (1974).

[17, 18] Here the trial court, on conflicting evidence, found that the consent to search was voluntarily given. We apply the same rules in reviewing a trial judge's determination of the voluntariness of a consent to search as we do in reviewing his determination of the voluntariness of a confession. Thus when conflicting evidence is presented on the issue of the voluntariness of a consent to search and the trial judge finds that the consent was voluntarily given, great weight must be given his judgment. This finding will not be disturbed on appeal unless the appellate court is convinced that the conclusion is palpably contrary to the weight of the evidence. Even where there is credible testimony to the contrary, if the evidence is fairly capable of supporting the inference that the rules of freedom and voluntariness were observed, the ruling of the trial judge need only be supported by substantial evidence and not to a moral certainty. *Sullivan v. State*, 340 So.2d 878, 880—881 (Ala.Cr.App.), cert. denied, 340 So.2d 881 (Ala.1976).

[19] Though it is argued that the appellant was intoxicated and had been without sleep for some time there is also credible evidence to the contrary and sufficient to support

the finding of voluntariness made by the trial judge.

VII

Over the objection of defense counsel Detective Downing was permitted to testify that the appellant was arrested and booked on a charge of indecent exposure on the morning after the rape. It was on this charge that the appellant was being held when viewed by the prosecutrix.

[20] Any error in the admission of this testimony was cured when defense counsel, in attempting to prove the legal insanity of the appellant at the time of the crime, introduced the testimony of Dr. Edwin Conrad Seger, Chief Psychologist on the Forensic Unit at Bryce Hospital, that the appellant "got arrested several times as being a peeping Tom and 'voyeurism', it's called"; that "he's also been arrested several times for indecent exposure" and that the appellant has a "long history" of "peeping Tom, exhibitionism, and things of that nature". This testimony of the appellant's own witness in response to questions from his own attorney eradicated any possible prejudice that may have resulted from Detective Downing's testimony. *Strickland v. State*, 151 Ala. 31, 44 So. 90 (1907); *Thompson v. State*, 53 Ala.App. 484, 301 So.2d 248 (1974); *McKenzie v. State*, 33 Ala.App. 7, 33 So.2d 484, cert. denied, 250 Ala. 178, 33 So.2d 488 (1948).

VIII

The appellant contends that the State failed to prove a sufficient degree of force to constitute rape and therefore his motion to exclude the State's evidence was due to be granted. In brief he argues that:

> "The evidence was to the effect that there was no fight between the alleged victim and the Defendant; that there was no affirmative evidence of a struggle; that there was no evidence that any blows or punches were exchanged

> or inflicted; that there was no evidence that the prosecuting witness scratched or attempted to scratch the Defendant; that there was no evidence that the alleged victim screamed out in despair or hollered for help; that there was no evidence that the Defendant offered to kill the alleged victim or do her serious bodily harm. In fact, the alleged victim testified that the only thing that the Defendant said to her which could be construed as a threat was, 'keep quiet and you won't get hurt'."

The prosecutrix was startled from her sleep in her own bedroom by a male who was standing near her bed. From what she could see of the individual, he was "stripped to the waist". The prosecutrix testified that she "was so dumbfounded and it happened so quickly—he was on top of me immediately". She was told to "keep quiet and you won't get hurt". The appellant "moved", "pulled", "dragged" and "wrestled" her around on the bed because she resisted by "locking" her legs and thighs. She tried to push herself away and thought about screaming but did not think that she would be heard. The prosecutrix testified that the appellant had her "pinned down" and it was impossible to hit him. She stated that she was in a state of shock and was bruised on her arms and legs though a physician found no evidence of any bruises the next day. The prosecutrix told the physician that there was "no struggle" and his report states that "no nail bed specimen is taken as the patient states she did not scratch or resist in this way".

[21, 22] To constitute rape, the degree of force used need not be such as to place the victim under such reasonable apprehension of death or bodily harm as to overpower her will, it being sufficient that she was under such duress that the act was accomplished against her consent. *Brummitt v. State*, 344 So.2d 1261 (Ala.Cr.App.1977); *Cole v. State*, 19 Ala.App. 360, 97 So. 891, cert. denied, 210 Ala. 179, 97 So. 895 (1923). "The force necessary to be used, to constitute the crime of rape, need not be actual, but may be constructive or implied. An acquiescence to the act obtained through duress or fear of

personal violence, is constructive force, and the consummation of unlawful intercourse by the man thus obtained would be rape." *Shepherd v. State*, 135 Ala. 9, 12, 33 So. 266, 267 (1903).

> "An acquiescence obtained by duress, or fear of personal violence, will avail nothing, the law regarding such submission as no consent at all. If the mind of the woman is overpowered by a display of physical force, through threats, expressed or implied, or otherwise, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man would be rape. 1 Whart. Cr. Law, §557; 2 Bishop Cr. Law, (7th Ed.), §1125; 3 Greenl.Ev., (14th Ed.), §211." *McQuirk*, 84 Ala. 435, 437, 4 So. 775, 776 (1887).

The offense of rape is complete when unlawful intercourse is accomplished by overcoming resistance, and procuring submission by means of threats, though there may be no intention in fact to apply actual force. *Taylor v. State*, 249 Ala. 130, 30 So.2d 256 (1947); *Norris v. State*, 87 Ala. 85, 87, 6 So. 371 (1888).

> "While the law arms a woman who is assaulted by a man with the intent to ravish her with the right to stand her ground, and, if necessary, to kill her assailant to protect her person from the gratification of his lust, the law does not compel her so to do. All of the circumstances surrounding the commission of the alleged crime are to be considered, and whether the prosecutrix does or does not repel force by force, or resist her assailant to the uttermost, if the act of penetration is actually accomplished by what, in law, amounts to legal force, and against the will of the prosecutrix, the defendant is guilty of rape. The relative size of the parties, the age of each, their social and racial differences, and the absence of efforts on the part of the prosecutrix to avoid the act are all matters to be weighed by the jury on the question as to whether

> all the necessary elements of the crime exist, but when all the elements of the crime do exist the crime is one of rape, although the prosecutrix may have made no effort to resist." *Herndon v. State*, 3 Ala.App. 118, 125–126, 56 So. 85, 87 (1911).

[23] Under the facts outlined the State presented prima facie evidence of the elements of rape and the trial judge properly submitted the case to the jury.

IX

[24] The appellant's objection to the closing argument was sustained. There was no motion to exclude and no request for the court to specifically instruct the jury not to consider the improper argument in their deliberations. *Boles v. State*, 19 Ala.App. 184, 186, 95 So. 909 (1923). There was no motion for new trial. Since no adverse ruling was obtained in the trial court there is nothing for this court to review. *Moore v. State*, 48 Ala.App. 719, 722, 267 So.2d 509 (1972).

X

[25] The trial judge denied the appellant's pretrial motion to take the deposition of the prosecutrix. This motion was made pursuant to that portion of Section 12–21–260(a), Code of Alabama 1975, which provides:

> "The defendant may take the deposition of any witness . . . . . where the defense, or a material part thereof, depends exclusively on the testimony of the witness."

In the motion it was asserted that "the Defendant has advised this attorney that he has no remembrance of the events which allegedly transpired on the date in question; therefore, at this stage, the defense depends *exclusively* on the testimony of the "said" prosecutrix. In denying the request the trial judge noted:

"The defendant's trial has been continued pending a psychological examination of the said defendant and there is no showing that the . . . . (prosecutrix), is unavailable for examination by the defendant, and further, the showing is insufficient that the defense rests exclusively on the testimony of the said Nancy Bush. Rather, it appears that . . . (the prosecutrix) is the primary witness for the prosecution, rather than the defendant. It further appears that the said . . . . (prosecutrix) is not absent from the State of Alabama."

We uphold the ruling of the trial judge denying the motion. Here the defense or a material part thereof did not depend exclusively on the testimony of the prosecutrix. At trial the defense was not consent. The appellant testified that he had never seen the prosecutrix before and that, although highly intoxicated on the date the crime was committed, he never raped anyone as far as he remembers. The request was properly denied.

We have searched the record and finding no error prejudicial to the appellant we affirm the judgment of the trial court.

AFFIRMED.

All judges concur.

APPENDIX "B"

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 20, 1979

Re: 78-435
EX PARTE: DENNIS ALFONSO WEATHERFORD

Petition for Writ of Certiorari to the
Court of Criminal Appeals

Re: DENNIS ALFONSO WEATHERFORD,
Appellant,

versus

STATE OF ALABAMA,
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * *

__X__ Petition for Writ of Certiorari denied.
No opinion.

* * *